

September 5, 2011

Ivan K. Fong, General Counsel  
Office of Principal Legal Advisor  
U.S. Department of Homeland Security (DHS)  
500 12th Street, SW, Stop 5009  
Washington, D.C. 20536-5009

Re: FOIA Appeal - ICE FOIA Case No. 2011FOIA13652  
OGIS Case No. 2011-0328 KF:RR  
USA v. Rigoberto Hernandez-Portillo, No. 1:07-cr-00081-GBL-4, E.D. Virginia, Alexandria 22314

To Whom It Concerns:

1. This will acknowledge receipt of a letter from ICE on 9/2/11 dated 8/29/11 as constituting an appeal (administrative), in good faith, as there was no response to the initial Request-Redress of June 1, 2011, as in default, except for OGIS.

2. Your letter is Refused for Fraud based on at least the obvious criteria:

A. Your letter claims "This is the final response." We have received nothing from ICE off our initial good faith letter of 6/1/11, some 3-months ago, as in violation and default of the Act(s).

B. The letter is not signed by the "FOIA Officer" whose name appears typed at the closing. The signator "for" does not identify itself. Please provide the full name and title of the signator.

C. Your indifference to the initial Request-Redress has created additional expense and delays on the wrongfully convicted, additional expense involving OGIS and additional expense against the victim of the wrongful conviction who is a poor person, now without the assistance of necessary specialized counsel and being continually harassed by your partners within the Federal Bureau of Prisons, in necessary Redress to the Government's overreaching. This appeal constitutes more of same. **Exhibits A & B.**

3. Your letter - hurdle seeks shelter behind FOIA Exemption 7[E] which is inapplicable to the facts of this case, as way down stream to the lack of jurisdiction to indict or prosecute the victim, Mr. Portillo, creating additional expense.

A. Documents-information developed before investigation into alleged criminal violations by ICE employees are not "compiled for law enforcement purposes." Stern v. FBI, 737 F.2d 84, 89 (D.C. Cir. 1984), et al.

B. Unlawful agency activities are not protection by Exemption 7(E). Mr. Portillo was only an informant by coercion, under duress and thus involuntarily. See Davin v. DOJ, 60 F.3d 1043 (3rd Cir. 1995). "Congress considered the enumeration of the specific basis for withholding material to be the principal means for narrowing the law enforcement exemption." Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994).

C. Redressor Portillo seeks specific documents related to his involuntary use by Agents as an Informant, not those related to legitimate law enforcement, in this case against other Defendants actually guilty of the crimes indicted for. "Compiled for law enforcement purposes" "is readily evaded (or illusory) if it requires nothing more than gathering up documents the government does not wish to disclose, with a plausible law-enforcement purpose in mind. This is a hole one can drive a truck through. John Doe Agency v. John Doe Corp., 493 U.S. 146, 163-64, et al (1989)(Justice Scalia dissent)(substituting the word "records" for "files" in the 1974 FOIA amendments was intended to prevent agencies from withholding records "produced in the routine course of government operations ... merely because they had been commingled with investigative materials generated later in the course of law enforcement proceedings."). Id @ 109.

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D. The government must demonstrate that the information relates to a pending or prospective law enforcement proceeding. NLRB v. Robbins, 437 U.S. 214 (1978). Mr. Portillo is serving a lengthy and wrongful 288-month prison sentence only relevant to the Government's need to deny and cover-up their own wrongdoing. **Exhibit C.**

E. Documents sought already in the possession of the targets of the investigation where agency failed to demonstrate that disclosure would interfere with law enforcement proceedings ... is insufficient. See Goldschmidt v. Dept. of Agric., 557 F.Supp. 274 (D.D.C. 1983).

F. A fortiori, Records or information also may not be withheld if disclosure would "(B) deprive a person of a right to a fair trial or an impartial adjudication." Wash. Post Co. v. DOJ, 863 F.2d 96, 101 (D.C. Cir. 1988). The court held that the government, in asserting (or defending) a 7(B) claim, "bears the burden of showing (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure (or withholding) of the material sought would seriously interfere with the fairness of those proceedings." Id. @ 102. As in Equal Protection - Due Process of Law. Likewise, in the Privacy Act, Specific Exemptions (k)(2) "Provided, however, that if any individual is denied any right, privilege (e.g., habeas corpus), or benefit that he would otherwise be entitled by Federal law, .... such material shall (emphasis) be provided ... ."

"As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA). It is only through a well-informed citizenry that the leaders of our nation remain accountable (emphasis) to the governed and the American people can be assured that neither fraud nor government waste (and mis-management) is concealed." Statement of Attorney General, 2001. **Exhibit D.**

The Agency shall disclose records administratively so as to avoid a further costly excursion into the already overburdened federal courts as a result of agency attempts to avoid accountability and the rule of law - Rights. Mr. Portillo has been wrongfully held accountable and likewise accountability shall be perfected on the Truth. Mr. Portillo was not pre-disposed to crime as without the mens rea. The simplest solution for both parties would be to deport him immediately. See 18 USC § 3582(c)(2) or 28 C.F.R. § 571.40(a), based on extraordinary circumstances.

The onus and cost of correcting this injustice is on the Government, again. It should do the right thing, at the least expense to the public purse. For Mr. Portillo, the ride is free, the alleged "deterrent value" is an illusion on all legitimate taxpayers footing the bill for this brand of "so-called justice."

"When plunder becomes a way of life for a group of men (women) living together in society, they create for themselves in the course of time, a legal system that authorizes it and a moral code that glorifies it." Frederic Bastiat (French Philosopher) (1800's)

Submitted in good faith, in the interests of law and justice, with all Right(s) reserved and invoked and without prejudice.

Sincerely,

Proof of mailing: *PK*

*Rigoberto Hernandez-Portillo*  
Rigoberto Hernandez-Portillo #72088-083  
Federal Correctional Institution (C2)  
POB 7000, 4001 Leopard Dr.  
Texarkana, TX 75505 (903)838-4587  
223-4424Fax

cc: OGIS (6)  
Jim Webb (2)

*F2*

U.S. Department of Homeland Security  
500 12<sup>th</sup> ST. SW; STOP 5009  
Washington, DC 20536-5009



U.S. Immigration  
and Customs  
Enforcement

September 19, 2011

*Rec'd  
9/25/11*

RIGOBERTO HERNANDEZ-PORTILLO  
#72088-083  
FEDERAL CORRECTIONAL INSTITUTION  
PO BOX 7000, 4001 LEOPARD DR.  
TEXARKANA, TX 75505

Dear Sir or Madam:

The Department of Homeland Security has received your letter appealing the adverse determination of your Freedom of Information Act/Privacy Act (FOIA/PA) request by U.S. Immigration and Customs Enforcement seeking records concerning your informant status.

On behalf of the Chief for the Government Information Law Division, we acknowledge your appeal request of 2011FOIA13652 and are assigning it number OPLA11-280 for tracking purposes. Please reference this number in any future communications about your appeal.

A high number of FOIA/PA requests have been received by the Department. Accordingly, we have adopted the court-sanctioned practice of generally handling backlogged appeals on a first-in, first-out basis.<sup>1</sup> While we will make every effort to process your appeal on a timely basis, there may be some delay in resolving this matter. Should you have any questions concerning the processing of your appeal, please contact ICE FOIA at 1-202-732-0600, or by email at [ice-foia@dhs.gov](mailto:ice-foia@dhs.gov).

Sincerely,

Susan Mathias

Chief

Government Information Law Division  
ICE Office of the Principal Legal Advisor  
Department of Homeland Security

<sup>1</sup> Appeals of expedited treatment denials will be handled on an expedited basis.